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No. (1)

Supreme Court, U.S.
FILED
07-553 OCT 25 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

WARD FRANKLIN DEAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. FAILURE TO PROVIDE JURY MATERIALS.

Pursuant to the Selection and Service Act of 1968, the district courts are to devise jury plans to ensure the right to a fair trial, 28 U.S.C. §1863. The Northern District Court of Florida devised such a jury plan. *Test v. United States*, 420 U.S. 28, 30 (1975) gives a defendant an "unqualified right" to inspect the jury materials required to be kept under the jury plan.

The question raised is: Did the 11th Circuit commit error when it upheld the District Court's failure to allow Dean an unqualified right to inspect the jury qualification questionnaires required by the district Jury Plan, but instead provided unauthorized jury information forms which indicated that numerous prospective jurors might not have been qualified for jury service and which explicitly did not include both the grand and petit jury forepersons' information forms?

II. IMPROPER GOOD-FAITH JURY INSTRUCTIONS.

Cheek v. United States, 498 U.S. 192 (1991), requires the government to prove willfulness in tax crimes by the actual knowledge of the pertinent legal duty and also established that a jury cannot base a guilty verdict on an "objectively reasonable" standard.

The question raised is: Did the 11th Circuit commit error when it affirmed the District Court's

giving of a good-faith jury instruction that allowed the government a lesser burden of proof and permitted the jury to determine whether Dean's good-faith belief was actually reasonable, violate the good faith principles set forth in *Cheek*?

III. ESSENTIAL ELEMENT OMITTED.

Sansone v. United States, 380 U.S. 343, (1965), established that an affirmative act constituting evasion of taxes was an essential element of the crime of income tax evasion under 26 U.S.C. §7201.

The question raised is: Should the 11th Circuit's decision be reversed when it upholds the District Court's failure to submit to the jury the essential element under 26 U.S.C. §7201 of an affirmative act constituting evasion of taxes as required by *Sansone*, but instead defines an attempt as failing to report all income?

IV. LETTERS WRITTEN TO FINANCIAL INSTITUTIONS TREATED AS A CRIME.

26 U.S.C. §7212(a) makes it a crime to in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstruct or impede, or endeavor to obstruct or impede, the due administration of Title 26. Dean wrote letters to various financial institutions advising them to verify the authority of the IRS agent to issue summonses before they released records to the IRS. These letters were alleged to be in violation of §7212(a).

The question raised is: When financial institutions are summonsed by the IRS, is sending letters advising them to verify the IRS agent's authority to issue summonses sufficient to constitute the crime of corruptly impeding or obstructing the due administration of the IRS, under 26 U.S.C. §7212(a) when the letters warn of legal action if there is an unauthorized release of records?

V. SENTENCING VIOLATES EX POST FACTO CLAUSE.

Apprendi v. New Jersey, 530 U.S. 466 (2000) prohibits judges from sentencing based on facts not found by a jury or admitted by the defendant. *United States v. Booker* 543 U.S. 220 (2005) appeared to render *Apprendi* inapplicable. But *Cunnigham v. California*, 549 U.S. ___ (2007) clarified that *Apprendi* was still applicable.

The question raised is: Does the retroactive application of the decision in *Booker*, that the Sentencing Guidelines were advisory for pre-*Booker* conduct of Dean, violate the *ex post facto/* due process clauses of the Constitution when the sentencing of Dean was based on a tax loss not found by a jury nor admitted by Dean?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Ward Franklin Dean" and Respondent: "United States of America").

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Sup. Ct. Rule 29.6 Ward Franklin Dean states:

1. He is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation that is a party to this case, nor is there a publicly owned corporation that has an interest in the outcome which is a party to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Ward Franklin Dean respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit which affirmed his criminal conviction.

OPINIONS BELOW

The 11th Circuit Court of Appeal's opinion (per Circuit Judges Birch, Fay and Cudahy) affirming the District Court's decision is published at *United States v. Dean*, 487 F.3d 840 (11th Cir. 2007) (Appendix A). A petition for rehearing and rehearing en banc was denied, but not published (Appendix C) (per Circuit Judge Peter T. Jay), nor was a stay of mandate sought. The judgment of the Northern District of Florida, Pensacola Division (Appendix B) (per Judge Lacy A. Collier) was not published.

STATEMENT OF JURISDICTION

The 11th Circuit entered its opinion and order on May 25, 2007 and the Motion for Rehearing and Rehearing EN BANC was denied on July 27, 2007. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 26 U.S.C. §7201; 26 U.S.C. §7212(a); and 28 U.S.C. §§1867(a) and (f) are set forth in Appendix D.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Ward Franklin Dean was charged with six counts of income tax evasion under 26 U.S.C. §7201 for the years 1997 through 2002 and one count of impeding the administration of the IRS under 26 U.S.C. §7212(a). A jury was convened on December 5, 2005 and reached a verdict of guilty on all seven counts on December 7, 2005.

Sentencing was held on July 6, 2006 and Dean was given a prison sentence of 84 months. Judgment was recorded on July 14, 2006 and a Notice of Appeal was timely filed.

The Eleventh Circuit Court of Appeals affirmed Dean's conviction on May 25, 2007. A timely Petition for Rehearing and Rehearing EN BANC was made. The Petition was denied on July 27, 2007.

Dean is currently incarcerated and serving the imposed prison sentence.

B. Statement of Facts

Each count of the income tax evasion charges included allegations that Dean attempted to evade taxes by filing false W-4 forms and/or filed tax returns claiming zero income.

Count seven of the indictment alleged impeding the administration of the IRS under 26 U.S.C. §7212(a) by sending letters that claimed 1.) the

defendant informed the entities that they were under no obligation to comply with a fraudulent summons; and 2.) the Defendant falsely claimed the summons was a phony document because the agent had no authority to issue a lawful summons.

Nine days prior to trial, Dean filed a motion to inspect the jury materials maintained by the clerk of courts pursuant to 18 U.S.C. §1867(f). The motion was granted on December 1st with instructions to contact the court in Tallahassee. The Tallahassee clerk did not provide any of the materials required to be maintained by the district's Jury Plan, i.e "jury qualification forms" that are required to be filled out prior to the names being placed in the qualified jury wheel and/or information contained in the court's database pertaining to the prospective jurors. Instead, the clerk provided Dean with only petit "jury information forms" filled out by the persons whose names were drawn from the qualified wheel to serve as jurors.

Before the trial began on December 5, 2005, Dean filed a motion to stay the proceedings because he had not received any material related to the grand jury. Arguments were heard and the court briefly delayed the trial to have the grand "jury information forms" e-mailed to the Pensacola court for viewing by Dean. No jury "qualification questionnaires" or other database information were ever provided by the clerk.

When Dean examined the "jury information forms" for the grand jury he discovered the grand jury foreperson's information form was not included.

The court was notified of the exclusion. Dean orally moved for a continuance until all the material was made available, but the court interpreted said motion as a motion to challenge the array of the grand jury and denied the motion.

The trial commenced on December 5, 2006. During the trial Dean pursued a good faith belief theory of defense. He also testified concerning his purpose in sending letters to the financial institutions which received IRS summonses for his records. Dean introduced a representative letter to reveal that his understanding and purpose of the letters was to strongly suggest the financial institutions not release records until they clearly identified the authority of the agent requesting the records and they had proper judicial authority.

Prior to trial Dean requested good-faith belief jury instructions. In addition he specifically requested an instruction on the requirement of an affirmative act.

A guilty verdict was rendered against Dean for all seven counts on December 7, 2005.

A Presentence Investigation Report (PSR) was prepared and accepted without change by the court. The PSR used the tax loss figures of $290,997.44 provided by the government to calculate a base offense level. This tax loss was neither found by the jury nor admitted by Dean. Prior to sentencing Dean filed a sentencing memorandum confronting several of the conclusions in the PSR. After arguments, Dean was sentenced to prison for 84 months. The

11th Circuit affirmed the conviction and denied Dean's Petition for Rehearing and Rehearing EN BANC.

REASONS FOR GRANTING THE WRIT

Petitioner Dean is mindful of the criteria set forth in Supreme Court Rule 10 which are used to determine whether the Court should review a decision of an appellate court.

Dean presents five questions for the Court to consider. In the discussion of each question Dean will specifically designate which criterion (or criteria) is applicable to the particular question.

With these principles in mind, Dean believes that in affirming the Dean's conviction the 11th Circuit panel misapprehended certain legal and factual questions in light of Supreme Court decisions and other circuit court decisions, departed from the normal and usual course of judicial proceeding by not upholding the law as passed by Congress.

QUESTION I
FAILURE TO PROVIDE JURY MATERIALS.

Did the 11th Circuit commit error when it upheld the District Court's failure to allow Dean an unqualified right to inspect the jury qualification questionnaires required by the district Jury Plan, but instead provided unauthorized jury information forms which indicated that numerous prospective jurors might not have been qualified for jury service and which explicitly did not include both the grand and petit jury forepersons' information forms?

A. Introduction.

1. Statutory requirements.

The 5th Amendment to the Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...."

The 6th Amendment to the Constitution guarantees to every citizen in a criminal prosecution that he "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

To preserve these two constitutional rights Congress enacted into law the Jury Selection and Service Act of 1968, 28 U. S. C. §1861 *et seq*. Of particular importance are §§1867(a) and (f).

§1867(a) allows a criminal defendant to file a motion to dismiss the indictment or stay the proceeding on the grounds of a substantial failure to comply with the provision of §§1861 *et seq*.

§1867(f) provides that a defendant is "allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion." "Such records" refers to the "contents of records or papers used by the jury commission or clerk in connection with the jury selection process."

2. District Court Jury Plan.

Pursuant to 28 U.S.C. §1863, the U.S. District Court for the Northern District of Florida, on July 26, 2004, devised a "Plan for the Random Selection of Grand and Petit Jurors" (Jury Plan). The Judicial Council of the U.S. Eleventh Judicial Circuit reviewed and approved the district's Jury Plan on October 18, 2004.

Section III of the Jury Plan included several pertinent definitions, such as:

> "Master Jury Wheel" or "Master Wheel" in subsection D is "...a term designating all names selected directly from official voter registration lists in a manner prescribed in this Plan;"
>
> "Qualified Jury Wheel" or "Qualified Wheel" in subsection E is "...a term designating the names of all persons

> determined to be qualified to serve as grand or petit jurors according to the manner prescribed in this Plan;"
>
> "Qualification form" or "Qualification questionnaire" in subsection F is "...a form prescribed by the Administration Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit certain information about a prospective juror."

Sections VI and VII of the Jury Plan prescribe the method by which names are randomly selected to be included the Master Wheel and the manner in which the Master Wheel is to be filled.

Section VIII describes the manner in which the names randomly selected from the Master Wheel are to be included in the Qualified Wheel. Included in this process is the requirement that the prospective juror are to be sent "qualification questionnaires" "...for the purpose of examining their qualification for jury service," see Section VIII, A, 2.

Pursuant to Section VIII, B, 1, the clerk is to send to each person randomly selected from the Master Wheel a "qualification questionnaire." According to subsection B, 2, if any of the "qualification questionnaires" are returned with faulty information, i.e. "omission, ambiguity, or error in the execution of the questionnaire," the clerk is to return the questionnaire to the prospective juror for correction.

Section VIII, C, governs the method by which the clerk shall determine if the prospective jurors drawn from the Master Wheel are qualified to be petit or grand jurors. Subsection 1 of Section VIII provides,

> "The Clerk, under the supervision of the court, ***shall determine solely on the basis of information provided on the qualification questionnaire*** whether a person is qualified for jury service, or unqualified for, or exempt, or to be excluded from jury service. ***The clerk shall record such determination on the qualification questionnaire or on the person's record in the court's electronic database.***" (Emphasis added)

Subsection 2 of Section VIII, C, sets forth the criteria governing how a person may be disqualified to serve as a grand or petit juror. The list of disqualification criteria is pursuant to 28 U.S.C. §1865(b). Two of the eight criteria are particularly important in this case. Thus, unless the prospective juror,

a. Is not a citizen of the United States; or
c. Has not resided for a period of one year within this district,

he or she is qualified to be a juror.

The Court did not provide Dean with the "contents of records or papers used by the jury commission or clerk in connection with the jury selection process." Nor did the Court follow the

requirements of the Jury Plan approved by the 11th Circuit.

B. QUESTION I - VIOLATION OF UNQUALIFIED RIGHT TO INSPECTION OF JURY MATERIALS.

1. Appellate Decision in Conflict with *Test*.

The 11th Circuit decision is in direct conflict with *Test v. United States*, 420 U.S. 28, 30 (1975).

When the Tallahassee clerk provided Dean with "jury information forms" on December 1st, she failed to give him the information authorized by the Jury Plan. The authorized materials should have been the "qualification questionnaires" and other database information.

Because he had not been provided "jury information forms" on the grand jurors and the information on the forms already provided on the prospective petit jurors gave the appearance that 21 of the prospective jurors failed to establish the citizenship and/or residency requirements required by the Jury Plan, Dean filed a motion to stay proceedings on the morning of December 5th prior to the trial.

Arguments were heard and the court briefly delayed the trial to have the grand jury information forms e-mailed to the Pensacola court for viewing by Dean. These grand jury "information forms" were the same type of forms already provided for the prospective petit jurors. The information contained

on these also indicated that some of the grand jurors may not have been qualified for juror service. Of particular concern to Dean was the fact the information form for the grand jury foreperson was missing from the forms given to him.

No "jury qualification questionnaires" or other database information, for either the grand or petit juries, were ever provided to Dean by the clerk. It was not until the government filed its Appellee Brief that Dean even became aware that the jury "information forms" were not the jury materials he requested in his motion to inspect. It was also during the appeal process that Dean discovered that the jury information form for the petit jury foreperson was also missing from the forms provided.

The District Court's denial of Dean's right to inspect the jury materials maintained by the clerk is in direct conflict with a decision of this Court. In *Test, supra,* 420 U.S. at 30 (1975), the court ruled that because the petitioner was denied his inspection of the jury lists, the appellate court judgment was to be vacated. The stated reason for the reversal was,

> "This provision makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the 'preparation' of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an ***unqualified right to inspection*** is required not only by the

> plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'" (Emphasis added and footnotes omitted)

Rather than uphold Dean's "unqualified right" to inspect the jury materials, the 11th Circuit made the same mistake that the District Court made: it treated Dean's motion to stay for the purpose of obtaining information he had not received as a motion to challenge the jury selection process. The reviewing panel ignored the fact that Dean had not received any of the jury materials the Jury Plan required the clerk to maintain. This was more than just an oversight because the government in its Appellee Brief informed the panel that the jury "information forms" were not the "qualification questionnaires" required by the Jury Plan. After being informed of the true nature of the jury information forms Dean, in his Reply Brief, carefully explained that the material required to be kept in connection with the clerk's selection process of the grand and petit juries were never provided to him.

Because he was not given any of the required jury materials and the information forms he was given indicated possible jury disqualifications and also did not include the form for the grand jury foreperson Dean was not in a position to make any motion relating to a challenge of the jury selection process under 28 U.S.C. §1867(a). The panel appeared to recognize this purpose, see *United States v. Dean*, 487 F.3d 840, 848 (11th Cir. 2007) wherein the panel stated, "Accordingly, the Appellant is not actually

challenging the jury selection process, but the decision to deny his motion to stay the trial." Even so, the panel applied the standards and legal authorities based on a motion to stay "on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury," 28 U.S.C. §1867(a). This misunderstanding caused the panel not to apply the correct standard of an "unqualified right" as mandated by *Test, supra*.

Instead of adhering to the *Test* "unqualified right" standard the panel offered two additional standards it believed Dean had to meet before he could inspect the jury selection materials. In addition to requiring an affidavit, which *Test* indicated was not necessary in obtaining jury selection materials, the panel also required that Dean make his challenge to the grand jury process within seven days of the indictment. See *Dean, supra*, 487 F.3d at 849 wherein the panel stated,

> "Because he did not try to inspect the grand jury list and jury qualification questionnaires within seven days of his indictment, the date on which he could have discovered if there were grounds for a challenge, he failed to meet the deadline for filing a motion to stay under 28 U.S.C. § 1867(a)."

Not only is this requirement unreasonable, unworkable and contrary to the law, it also fails to address the petit jury issue.

Because the clerk did not provide him the proper jury materials required to be maintained, Dean was effectively denied the *Test* "unqualified right" to inspect the jury materials. Furthermore, the time and affidavit restrictions applied by the panel are simply not applicable when there is a denial of the "unqualified right."

Accordingly, the Supreme Court should grant the Writ of Certiorari to review the 11th Circuit's decision in light of the *Test* mandate.

2. Appellate Decision in Conflict with Other Circuit Decisions.

Other circuit courts have followed the *Test* "unqualified right to inspection" standard. See *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) and *Government of Canal Zone v. Davis*, 592 F.2d 887, 889 (5th Cir. 1979). In *United States v. Alden*, 776 F.2d 771 (8th Cir. 1985) the court also found the district courts are "not free to establish additional requirements defendants must meet in order to gain access to jury selection records." Dean's "unqualified right" was clearly violated when he was not allowed to inspect any of the jury "qualification questionnaires" and what material he did inspect was incomplete and contained indications that many prospective jurors might not be qualified.

Accordingly, this Court should grant the Writ of Certiorari to review the 11th Circuit's decision because it is in conflict with other circuit court decisions.

3. Supervisory Powers Warranted.

The application of the *Test* mandate for an "unqualified right to inspect" the jury materials is especially pertinent in light of the uncontested fact that the grand and petit jury forepersons were never accounted for through the jury information forms actually provided and also for the admitted fact that Dean never received the "qualification questionnaires" used by the clerk in the jury selection process.

Not only did the District Court fail to comply with 28 U.S.C. §1867(f) by not allowing Dean to inspect the all of the jury materials, especially the "qualification questionnaires," but it also was fully aware of the fact that the grand jury foreperson was not represented in the "jury information forms" that were provided to Dean. The District Court was also aware of the fact that at least 21 prospective petit jurors had filed out their "jury information forms" in such a manner as to call serious question as to their qualifications to be jurors. The District Court's suggestion that these faults could be resolved during the *voir dire* process indicates that it did not consider its compliance with the Jury Plan to be of great consequence. The fact that the 11th Circuit also ignored the District Court's failure to comply with the Jury Plan also raises questions concerning the integrity of the judicial system in affording a defendant a fair trial and in impartial jury. This is especially true when informed that the petit jury foreperson's information form was also missing.

By not allowing Dean the inspection of jury materials required by the Jury Plan to be kept by the clerk and ignoring the obvious failure to comply with the Jury Plan, the District Court has so far departed from the accepted and usual course of judicial proceedings in the jury selection process that an exercise of this Court's supervisory power is warranted. The same supervision is equally warranted for the 11th Circuit which has sanctioned such a departure. Accordingly, Dean requests this Court to grant the Writ of Certiorari to review what appears to be a blatant refusal to comply with the Jury Plan as mandated by 28 U.S.C. § 1861 et seq.

C. QUESTION II - IMPROPER GOOD-FAITH JURY INSTRUCTIONS.

Did the 11th Circuit commit error when it affirmed the District Court's giving of a good-faith jury instruction that allowed the government a lesser burden of proof and permitted the jury to determine whether Dean's good-faith belief was actually reasonable, violate the good faith principles set forth in *Cheek*?

1. Introduction.

The right to a fair trial and impartial jury of the 6th Amendment is preserved by the trial court giving jury instructions that adequately inform the jury as to the nature of the crime and the elements the government must prove beyond a reasonable doubt before a defendant may be found guilty. Dean was charged with seven felony counts. Six were for

violations of 26 U.S.C. §7201, evasion of income taxes.

26 U.S.C. §7201 states in pertinent part, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall,...be guilty of a felony." §7201 requires three essential elements. These elements were firmly established in *Sansone v. United States*, 380 U.S. 343, (1965). They are:

1. willfulness;
2. the existence of a tax deficiency; and
3. an affirmative act constituting an evasion or attempted evasion of the tax.

The government must prove "willfulness" beyond a reasonable doubt. *Cheek v. United States*, 498 U.S. 192 (1991) examined "willfulness" jury instructions in light of the 6th Amendment and determined a good-faith belief was a negation of "willfulness." The Court held, in tax crimes where willfulness is an element, the government must prove a defendant knew he had a duty the law imposed upon him and he "voluntarily and intentionally violated that duty," *Cheek*, *supra*, 498 US at 201. In meeting this burden of proof the Court stated,

> "...if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that, because

> of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In the end, the question is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at question, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *Cheek*, *supra*, 498 US at 202.

The *Cheek* court also explained it was error for a trial court to instruct the jury that the good-faith belief must be "objectively reasonable," *id* at 203. By giving the jury an instruction requiring a good-faith belief to be "actually reasonable," the court effectively changes the nature of the good-faith belief for the jury to consider from a factual determination into a legal determination. The effect is to remove the factual question of willfulness from the jury's purview. It is the same as instructing the jury that the defendant's belief must be reasonable when compared with some independent standard. It ignores that a person may have an 'irrational' belief that renders it impossible for him to violate a known legal duty.

In the *Cheek* case, the defendant proclaimed he had a good-faith belief that he was not required to

file tax turns, that he was not required to pay taxes, and that wages were not taxable as income under the Code. Despite the Court's view that these beliefs were irrational, it determined that if Cheek could convince the jury these were his beliefs and the jury believed him, it could not find him guilty of a crime requiring willfulness. As quoted above, the Court specifically held a jury was not to be instructed that an objectively reasonable standard could be a factor in determining if a defendant in a tax crime requiring willfulness had a good-faith belief which would negate willfulness.

The trial court in this case violated the principles established by *Cheek* in at least two ways that require reversal.

2. Jury Instruction in Conflict with Cheek.

a. Lesser Burden of Proof Permitted.

The pertinent jury instructions containing the offending instruction regarding good-faith belief made by the District Court is set forth in Section B of Appendix E.

The trial court violated the *Cheek* standard by taking a direct quote from *Cheek* out of context. The court quoted *Cheek*, "If the government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement," *Cheek*, *supra*, 498 U.S. at 202.

The quote does not complete the thought of the Court. This statement alone gives the jury the false impression that all the prosecution had to do was show a defendant knew the law. It removes the government's burden of negating a defendant's good-faith belief that he did not violate the law. Without more, the statement allows the government to shoulder a lesser burden with respect to the question of willfulness. In actuality, *Cheek* immediately follows the quoted statement with a clear qualification which was not conveyed to the jury here. That qualification is,

> "But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty on him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In the end, the question is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at question, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *id*.

Had the entire understanding of the *Cheek* decision been given, the jury would have had to consider whether the government adequately met its burden of negating Dean's good-faith belief defense.

As instructed, the jury did not have to consider whether the government negated the good-faith belief of Dean.

b. Instruction Created Internal Conflict.

The second way the trial court violated the *Cheek* good-faith instructions was actually a negation of the *Cheek* principles. It was also inconsistent with the established language authorized by the 11th Circuit. The trial court stated,

> "This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was ***actually reasonable*** as a factor in deciding whether he held that belief in good faith." (Emphasis added)

The two sentences just quoted are diametrically opposed to one another. On the one hand, the Court instructed the jury that an "objectively reasonable" standard ***may not be used*** to determine whether a belief held by Dean was a good-faith belief. On the other hand, in the very next sentence, the Court instructed the jury it ***may use*** an "actually reasonable" standard to determine if there was a good-faith belief. This created an "internal conflict" because the terms "objectively reasonable" and "actually reasonable" are virtually synonymous. During the jury charge conference, Dean's counsel voiced his objection to the language as creating an "internal conflict."

The label "internal conflict" is apt when the two sentences are read in normal terms. The language used in the second sentence makes it clear the jury was to consider the objectively reasonable standard even though the standard was not supposed to be applied.

The second sentence actually negates the principle espoused in *Cheek*. It is also not found in the *Cheek* decision.

The *Cheek* decision, 498 U.S. at 203-204 clearly declared it error for a court to disregard Cheek's understanding of the law even if it was irrational,

In deviating from the *Cheek* standards the 11th Circuit also deviated from its own standards. In *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994) reached the same conclusion. The court, in relying on *Cheek*, stated. "Such specific intent may be negated by a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, regardless of whether or not the belief is reasonable." Thus, it is not a question of whether the jury finds the belief of the defendant is reasonable, but a question of whether the defendant actually had the belief, as unreasonable as it may seem to the jury.

However unreasonable Dean's belief may have seemed to the jury, it was not their job to determine if it was reasonable, but whether Dean actually had the belief. Consequently, the practical effect of the jury instruction given by the Court effectively negated any good-faith belief defense and essentially

asked the jury to find Dean's belief not a valid defense because it was not actually reasonable.

The 11th Circuit decision affirmed the District Court's good-faith jury instruction by stating that it "conforms quite well to the Supreme Court's holding in *Cheek*," *Dean*, *supra*, 487 F.3d at 850. Yet, the panel did not address the internal conflict created by the two diametrically opposed sentences. For this reason the 11th Circuit's decision to uphold the good-faith jury instruction is in conflict with this Court's decision in *Cheek*.

Accordingly, Dean requests this Court to grant the Writ of Certiorari to review the 11th Circuit's decision to uphold a jury instruction in conflict with *Cheek*.

D. QUESTION III - ESSENTIAL ELEMENT OMITTED.

Should the 11th Circuit's decision be reversed when it upholds the District Court's failure to submit to the jury the essential element under 26 U.S.C. §7201 of an affirmative act constituting evasion of taxes as required by *Sansone*, but instead defines an attempt as failing to report all income?

1. Jury Instruction in Conflict With *Sansone*.

Dean was charged with six counts of income tax evasion under 26 U.S.C. §7201. As discussed in QUESTION II above, §7201 requires three elements.

One of them is an affirmative act constituting an evasion or attempted evasion of the tax. This essential element was not given to the jury in the jury instructions.

This Court has not altered the elements of the crime of income tax evasion since *Sansone*. Thus, the elements of the crime under §7201 remain the same. It should be noted that The 11th Circuit has also accepted as authoritative these three elements, see *United States v. Hunerlack*, 197 F.3d 1059 (11th Cir. 1999); *United States v. Kaiser*, 893 F.2d 1300 (11th Cir. 1990); and *United States v. Edwards*, 777 F.2d 644 (11th Cir. 1985).

The jury instructions related to the charge of income tax evasion are set forth in Section B, Appendix E. Of particular concern is the Court's definition of the word "attempt." The Court concluded its definition by with "...but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, ***by willfully failing to report*** all of the income which he knew he had during that year." (Emphasis added)

Notwithstanding the allegations of affirmative acts in the indictment, the Court completely omitted the affirmative act element of a §7201 income tax evasion crime in the jury instructions. Consequently, the jury was not asked to determine if Dean committed an affirmative act constituting income tax evasion. Thus, the jury could not have found him guilty of income tax evasion.

Dean specifically requested an instruction on the requirement of an affirmative act. The requested instruction read: "The failure to act is an act of omission, and is neither an act of commission or an affirmative action. Failing to file tax returns, failing to keep records, failing to report and failing to pay income taxes are not affirmative acts or acts of commission."

The request was ignored by the court. Instead, the Court gave an incorrect definition of "attempt."

The explanation of the term "attempt" in the jury instruction previously quoted effectively told the jury that no affirmative act was required. The jury instruction given does not mention an affirmative act with regard to the income tax evasion charges. The charge given is an instruction that would be more proper as a jury instruction on 26 U.S.C. §7203, a charge of failure to file. The definition used by the District Court is clearly in conflict with the *Sansone* decision.

Not only was the jury not told that an affirmative act had to be found before Dean could be found to have committed the crime of income tax evasion, it was specifically told Dean could be found guilty solely because he failed to report all of the income tax. Thus, the jury was given the much lower standard of a misdemeanor to convict Dean of a felony. This instruction resulted in the government having to meet a far lower burden than contemplated by §7201 and the decisions of the Supreme Court as well as those of the 11th Circuit. The Court should have instructed the jury that an

affirmative act was an essential element of the crime. Its failure to so instruct is highly prejudicial error and requires this Court's review.

In upholding the omission of the essential element of an affirmative act the 11th Circuit simply stated, "Nevertheless, our pattern jury instructions clearly state the elements of proof required for conviction under both 26 U.S.C. § 7201." The panel did not acknowledge that an affirmative act was omitted from the instructions. Nor did it address the fact that definition of the word "attempt" used by the District Court clearly did not include an affirmative act. Instead, affirmed the District Court's leaving the jury with the understanding that if they found that Dean had failed to report all of his income, he would be guilty of the felony crime of income tax evasion.

Accordingly, this Court should grant the Writ of Certiorari to review the 11th Circuit's decision since it upheld a jury instruction in direct conflict with this Court's decision in *Sansone*.

2. Jury Instruction in Conflict With All Circuits.

In addition to departing from *Sansone* and the previous 11th Circuit decisions listed above, this question crimes is of exceptional importance in that the 11th Circuit is the only circuit that has a pattern jury instruction for §7201 which fails to properly address the affirmative act element required by *Sansone*. Every other circuit court that has dealt with the question has required an affirmative act or act of commission.

There are several circuits that have placed their pattern criminal jury instructions on their websites. They are: the 5th, 7th, 8th, 9th, and 10th circuits. Note that the 1st Circuit does not show its pattern jury instructions on its website. The website address of http://www.med.uscourts.gov/practices/crimjuryinstrs.htm contains the 1st Circuit's pattern jury instructions, which is the website for the District of Maine. All these circuits include in their instructions relating to income tax evasion terms equivalent to either the affirmative act or an act done willfully. None of them have an instruction that defines "attempt" as simply a failure to report.

The rest of the circuits, while not having their jury instruction on websites, do have decisions that are consistent with *Sansone* in stating that an affirmative act is required in an attempt to evade taxes. These circuits have followed the *Sansone* requirement of an affirmative act in the following cases: *United States v. D'Agostino*, 145 F.3d 69, 72 (2nd Cir. 1998); *United States v. Voigt*, 89 F.3d 1050, 1089 (3rd Cir. 1996); and *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997). Thus, all of the circuits are in accord with *Sansone* except the 11th Circuit.

It should be noted that the very recent case of *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007) and *United States v. Nolen*, 472 F.3d 362, 376-379 (5th Cir. 2006). The *Nolen* case is particularly instructive in revealing the error committed by the District Court and the 11th Circuit. The *Nolen* court defined the word "attempt" very similar to, but vastly different from, the 11th Circuit. Its definition was,

> "The word 'attempt' contemplates that the defendant had knowledge and understanding that...he had income which was taxable and which he was required by law to report, but he nevertheless attempted to evade the tax...on that income by ***willfully concealing income*** which he knew he had during that year." *Nolen*, *supra*, 472 F.3d at 378. (Emphasis added)

"Willfully concealing income" is an affirmative act, while "willfully failing to report" income is an act of omission.

In addressing the requirement of an affirmative act, as opposed to an act of omission, the *Nolen* court stated,

> The mere failure to pay a tax voluntarily when due, even if willful, does not establish a criminal attempt to evade. "The difference between the [felony of attempted evasion of payment and the misdemeanor of willful failure to pay] is found in the affirmative action implied from the term `attempt,' as used in the felony."(fn39) "That is, a felony tax evasion requires willful commission, whereas the misdemeanor merely requires willful omission."(fn40) The government must prove "a willful attempt to defeat and evade" involuntary or forced payment, by means of "conduct, the likely effect of which would be to mislead or conceal," as long as "the tax-evasion motive plays any part in such conduct."(fn41) "[A] defendant is

> entitled to a charge which [sic] will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors."(fn42) *Nolen*, *supra*, 472 F.3d at 379. (Citations to footnotes omitted)

Thus, it is clear that the 11th Circuit's decision to up hold a jury instruction that omits the requirement of an affirmative act in conflict with all of the other circuit courts.

Accordingly, this Court should grant the Writ of Certiorari to review the 11th Circuit's decision because it is in conflict with all of the other circuit court.

E. QUESTION IV - LETTERS WRITTEN TO FINANCIAL INSTITUTIONS TREATED AS A CRIME.

When financial institutions are summonsed by the IRS, is sending letters advising them to verify the IRS agent's authority to issue summonses sufficient to constitute the crime of corruptly impeding or obstructing the due administration of the IRS, under 26 U.S.C. §7212(a) when the letters warn of legal action if there is an unauthorized release of records?

1. Factual Background.

Count seven of the indictment charged Dean with impeding the administration of the IRS under 26 U.S.C. §7212(a). The charge reads that Dean,

> "...did corruptly endeavor to obstruct and impede the due administration of the internal revenue laws by sending letters to entities that had received a lawful summons for documents from the Internal Revenue Service and by falsely and fraudulently informing the entity that it "was under no obligation to comply with this fraudulent summons," and that the summons was "a phony document sent by a 'Revenue Agent' who has no authority to send a lawful summons to anyone," in violation of Title 26, United States Code, Section 7212(a)."

In contrast, Dean sent the letters based on his understanding of the Supreme Court case of *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) and his research of the law on Title 26. Dean's understanding was that government agents had to have delegated authority before any IRS summonses they issued were lawful. Dean could not find a delegation of authority for the agent issuing the summonses. Furthermore, the IRS agent issuing the summonses refused to show Dean any delegated authority. Therefore, Dean concluded the summonses were unlawful.

In his letters Dean explained his belief and gave his advice to the financial institutions receiving the

summonses. Dean further testified what he believed was the intent of the letters. On direct examination Dean read from one letter as follows: "Pursuant to the *Federal Crop Insurance* case, I suggest that before any disclosure is made, you obtain from Revenue Agent Jackson copies of a delegation order authorizing him to issue summonses and to examine my books and records, as well as a copy of an enforcement commission."

Dean's stated purpose was to advise the financial institutions they needed to assure themselves of the agent's authority and the validity of the summons, which Dean believed invalid, before they turned over the records requested.

Based on the foregoing facts the question for this Court to consider, "Was it legally possible to commit the crime of impeding the due administration of the IRS with the actions alleged in the indictment?"

There are three separate, but equally important reasons why the charged conduct did not constitute a crime or grounds for an enhancement. The first two reasons virtually mandate that this Court exercise its supervisory powers to correct an injustice that has opened the door for the IRS to label crimes actions never contemplated by Congress as criminal.

2. Expansion of §7212(a) To Actions Never Before Crimes Requires Supreme Court Supervision.

This is a question of first impression. 26 U.S.C. §7212(a) has never been used to charge and convict an individual for writing to financial institutions requesting them to verify the authority of the agent and/or summons before releasing information to the IRS. Nor has this Court or any circuit court addressed this novel use of §7212(a).

The first reason is that the legislative history of Congress when it addressed §7212(a) in the 1954 Code spelled out exactly the conduct to which the section applied. See H.R. Rep. No. 1337, U.S. Code Cong. & Admin. News 1954, pp. 4017, 4574. There nothing in the statute or the legislative history makes letters to a bank advising them of a course of action relating to summonses criminal conduct.

The second reason addresses the unenforceability of an IRS summons with court action. At trial Dean's counsel made reference to a 2nd Circuit case named *Schulz*, see *Schulz v. I.R.S.*, 395 F.3d 463 (2nd Cir. 2005), citing *United States v. Bisceglia*, 420 U.S. 141, 146 (1975). *Schulz* made it clear that an IRS summons had no legal consequences if not backed by a federal court order. *Schulz*, citing *Reisman v. Caplin*, 375 U.S. 440, 446-447 (1964), found that individuals can not be punished for refusing to comply, regardless of their reasons.

Thus, pursuant to this Court and the 2nd Circuit, no one can be punished for refusing to comply with

IRS summonses regardless of the reasons, or lack thereof, for the refusal. Accordingly, it is legally impossible for Dean to have committed the crime.

In spite of these two strong reasons for not allowing letters written to financial institutions to be considered criminal actions, both the District Court and the panel ignored them. In order to uphold Dean's prosecution the panel also ignored the plain intent of the letters, which were to request the financial institutions to comply with Dean's understanding of the law. The panel then distorted the letters. What was an "if" letter became, in the eyes of the panel, a "threatening" letter. Dean warned financial institutions he would hold them liable only "if" there was an unauthorized release of records.

Furthermore, the statements made by Dean were all supported by his understanding of the plain language of the statutes. The panel treated them as if Dean knew they were not true, i.e. "The IRS sent him copies of each of the summonses it issued and he knew from his prior court challenge that the IRS had clear legal authority to investigate his earnings," *Dean*, *supra*, 487 F.3d at 853.

The mere fact of sending a summons does not negate Dean's belief that it was not a legal summons. Furthermore, the panel's reference to a nebulous non-record court case addressing the investigatory powers of the IRS, that Dean supposedly knew the IRS had authority to investigate him does not even imply that he "knew" the summons was proper.

In short, Dean's letter, read in context and in its plain language, was not intended to secure for him an unlawful benefit, but rather, to strongly advise the financial institutions to comply with a judicial order, via the provisions of §7604, as opposed to a summons issued by an revenue agent who appeared to lack the statutory authority to issue said summons.

In light of the fact that Congress indicated no intention to included letter writing to financial institutions to advise them to comply with the law and that IRS summons is unenforceable without a federal court order the 11th Circuit has endorsed the District Court's creation of a new crime.

Accordingly, Dean requests this Court to grant the Writ of Certiorari to review of the District Court's and the 11th Circuit's decision to permit what is obviously an arbitrary expansion of §7212(a) to cover actions that have never before been considered crimes.

3. Expansion of §7212(a) To Actions Never Before Crimes in Conflict with Several Supreme Court Decisions.

Most importantly the decision of the panel to allow Dean's action in sending letters to financial institutions explaining his beliefs and suggesting they exercise due diligence before releasing private records to be considered a crime under §7212(a) is in direct violation of a series of this Court's rulings that vigorously protect the right of free speech under the 1st Amendment of the United States Constitution.

The 1st Amendment states very clearly, "Congress shall make no law...abridging the freedom of speech." However, applying 26 U.S.C. §7212(a) to letters written to express a belief, and advising of Supreme Court cautions, is clearly an abridgment of free speech.

This Court has routinely condemned convicting individuals based on writing letters. In *Herndon v. Lowry*, 301 U.S. 242, 258-259 (1937), the Court made the following observation: "And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

Thus, for a criminal statute, such as §7212(a) to apply to the exercise of free speech, before the penalty can be imposed it must be shown that the speech involved was made with intent to induce resort to violence or with a purpose to violently subvert the government. The letters alleged in the indictment claiming Dean impeded the administration of the IRS do not meet either of these two criteria.

Several years later, the *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) decision set forth more standards which must be met before the government can abridge freedom of speech. Dean's letters did not meet any of the *Chaplinsky* criteria.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969) established the additional principle that, in order for the government "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Here, the government obviously disagreed with Dean's belief that the IRS agent lacked authority. The government, however, bears the burden of proving the reasonableness of the infringement and constitutionality of its actions, see *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000).

The 1st Amendment prohibits the government from making speech and expressive conduct illegal, especially merely because of disapproval of ideas contained in expressions. "Content-based regulations are presumptively invalid." See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In confirming the invalidity of content-based regulations, the *Playboy* Court, *id*, stated, "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based regulations are presumptively invalid,' [citation omitted] and the Government bears the burden to rebut that presumption."

Dean expressed his belief in writing and mailed it to a financial institution. The government

disfavored it because of content. The content was not in the categories delineated by the Courts and excluded from 1st Amendment protections. As such any criminal penalty based on Dean's free exercise of speech is presumptively invalid.

Accordingly, this Court should grant the Writ of Certiorari to review the 11th Circuit's decision in light of the Supreme Court rulings cited above.

F. QUESTION V - SENTENCING VIOLATES *EX POST FACTO* CLAUSE.

Does the retroactive application of the decision in *Booker*, that the Sentencing Guidelines were advisory for pre-*Booker* conduct of Dean, violate the *ex post facto*/ due process clauses of the Constitution when the sentencing of Dean was based on a tax loss not found by a jury nor admitted by Dean?

On appeal Dean raised the issue of whether the District Court erred when it sentenced him in violation of the *ex post facto*/due process clauses of the Constitution.

Dean was charged with income tax evasion for the years 1997 through 2002. The charges included conduct before this Court decided *United States v. Booker*, 543 U.S. 220 (2005). This Court ruled in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that a judge exceeds his proper authority when he determines facts, not found by the jury or admitted

by the defendant, based on a preponderance of evidence that would enhance the sentence.

Dean was sentenced based on a tax loss of $290,997.44, an amount not found by the jury nor admitted. The jury did not determine any tax loss occurred, because it was specifically told through the Jury Instructions that "the proof need not show the precise amount" of tax loss. In other words, the jury found that Dean evaded the assessment, but never made a determination as to what the tax lost was. Thus, pursuant to *Apprendi*, because the tax loss was not determined by the jury, Dean's base offense level under the sentencing guidelines would have been six under Sentencing Guidelines, §2T1.1(a)(2), which would have qualified Dean for probation or imprisonment for 0-6 months.

After *Booker*, however, the circuit courts no longer applied *Apprendi*. Consequently, Dean was sentenced based on a judge's preponderance of evidence determination that the tax loss was $290,997.44. The result was a base level of 18. Thus, before any adjustments or enhancements Dean's minimum prison sentence would be in the range of 27-33 months. Accordingly, solely because the panel understood *Booker* to render *Apprendi* superseded by *Booker* in sentencing guideline cases, Dean's base sentence was increased by at least 27 months. Dean's unique circumstances clearly characterize a violation of the *ex post facto* clause. The panel did not address these distinctive aspects.

The question of whether a judicial decision changing the common-law was an *ex post facto*

violation of Article 1, Section 9 of the Constitution was considered in *Rogers v. Tennessee*, 532 U.S. 451 (2001). This Court held that a common-law change made by a court did not violate the *ex post fact* clause. In reaching this decision the Court distinguished common-law judicial decisions from judicially created legislative changes. While the Court held that the *ex post facto* clause was not implicated in judicial decisions changing common-law, it also noted, "that limitations on *ex post facto* judicial decision-making are inherent in the notion of due process." This statement was based on its previous discussion of and quote from *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). *Bouie* specifically applied the *ex post facto* prohibition to the courts by stating, "If a ... legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that [the Court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction." It is without question that *Booker* made judicially-created legislative changes regarding the sentencing guidelines. Accordingly, the principles set forth in *Rogers* and *Bouie* apply and the panel's decision is in direct conflict with the *Rogers* and *Bouie* decisions.

At the time Dean filed his Appellant Brief he argued that the District Court erred in refusing to apply the principles of pre-*Booker* case law, most notably *Apprendi, supra*. Likewise, all circuits after *Booker* permitted the judge to make additional factual findings following a preponderance of the evidence standard in determining sentencing. But in his Reply Brief, Dean pointed out that *Cunnigham v. California*, 549 U.S. ___, 166 F.2d 856 (2007),

decided on January 22, 2007, had effectively affirmed Dean's sentencing arguments and Appellant Brief arguments. The decision also effectively overruled the position held by the District Court and upheld by the panel. The *Cunningham* decision has specifically clarified its *Booker* decision to correct the erroneous direction the circuits were going. Most notably, the Court ruled that, "*Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless," *Cunningham*, supra, 166 L.Ed.2d at 876.

Thus, the sum and substance of the *Cunningham* decision is that the pre-*Booker* cases such as *Apprendi* have not been overruled. They are still in effect. Yet, the panel ignored or overlooked the *Cunningham*, *Rogers* and *Bouie* decisions and is therefore in direct conflict with them.

It should also be noted that a review by this Court would have far reaching affects tax related and drug cases in which the conduct was pre-*Booker*, but the trial or sentencing was post-Booker. This is true since virtually all tax related and drug related crimes require a specific amount of tax loss or drug quantity to be found before the appropriate period of imprisonment can be determined.

Accordingly, this Court should grant the Writ of Certiorari to review the 11th Circuit's decision in light of its decisions in *Rogers*, *Bouie* and *Cunningham*.

CONCLUSION

In view of the foregoing arguments showing that the 11th Circuit decision upholding his conviction was in conflict with holdings of both this Court and decisions of other circuits and due to the serious implications affecting the integrity of the judicial system and its fairness in criminal trials as well as showing that there are questions of great importance, Dean respectfully request this Court to grant his Petition for a Writ of Certiorari on the questions presented heretofore.

Respectfully submitted this 25th Day of October, 2007.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13946

D.C. Docket No. 05-00025-CR-3-LAC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WARD FRANKLIN DEAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(May 25, 2007)

Before BIRCH, FAY, and, CUDAHY, * Circuit Judges

*Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

Filed
U.S. Court of Appeals
Eleventh Circuit
May 25, 2007
Thomas K. Kahn
Clerk

PER CURIAM:

Ward Franklin Dean appeals his conviction and sentence for income tax evasion, 26 U.S.C. § 7201, and attempted interference with the administration of internal revenue laws, 26 U.S.C. § 7212(a). Dean challenges his conviction on a number of grounds, arguing that there was insufficient evidence to convict him of the attempt at obstruction and that the jury received erroneous or misleading instructions. Dean also argues that the district court failed to comply with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, by denying him an opportunity to inspect the Grand Jury list and failing to comply with the District Court Jury Plan.

Dean challenges the constitutionality of his sentence as well, arguing that the court improperly applied the holding in *United States* v. *Booker,* 543 U.S. 220 (2005) to his sentence, which addressed *pre-Booker* conduct. According to Dean, the retroactive application of *Booker* to his sentence violates due process and the constitutional prohibition against *ex post facto* laws. For the reasons stated below, we affirm Dean's conviction on both charges and the district court's sentence.

I. BACKGROUND

In 1996, Ward Dean, a medical doctor, published author, and retired naval flight surgeon, became a tax protester. He had always paid his federal income taxes faithfully up to this point, but on his 1040EZ tax form for 1996, Dean suddenly reported his income and his tax liability as "0." At the time, Dean was earning over $100,000 a year as the Medical Director for Vitamin Research Products and drawing

down roughly $36,000 a year through his navy pension. Although Dean's accountant, John Graham, prepared a 1996 return and a 1997 return that reflected Dean's true earnings and his tax liability, Dean refused to file these returns and substituted 1040EZ forms that stated he owed nothing in taxes. Dean also submitted a revised W-4 form to his employer, claiming that he was exempt from federal income tax withholding for 1997.

The Internal Revenue Service ("IRS") sent Dean a letter on October 2, 1998, informing him that it considered his 1996 return frivolous because it reported "0" income, notwithstanding documentation to the contrary. That did not dissuade Dean from continuing to report his income and tax liability as "0" on subsequent tax returns, however. In 1998, Dean filed a credit application that stated his yearly income was $150,000, but when he submitted his tax return for 1998, he reported an adjusted gross income of "0" on form 1040EZ. In 1999, Dean filed another credit application that stated his yearly income was $144,000. Yet, once again, when he filed his 1999 tax return, he reported his income as "0" on form 1040.

Both the 1040EZ form and the 1040 form state on the face of the form that wages and pensions constitute income which is to be reported. The instruction booklet that the IRS puts out for these forms also states that wages and pensions constitute income. Nevertheless, Dean continued to deny any tax liability on his 1999, 2000, and 2001 income tax returns, entering "0" income on his 1040 forms for

1999-2001. He also continued to claim on his W-4 forms that he was exempt from withholding.

The IRS, for its part, continued to notify Dean that his returns incorrectly reported no income or tax liability and that he was required to pay income tax. On October 10, 2001, IRS sent Dean a letter regarding his 1997 return. The letter stated that the IRS would uphold a $500 penalty that the Service had imposed upon him for filing a frivolous income tax return in 1997. Dean challenged the penalty in the United States District Court for the Northern District of Florida.

In the meantime, IRS Revenue Agent Wayne Jackson had begun to investigate Dean's burgeoning tax debt. On January 10, 2002, Jackson issued summonses to Dean's employer, to the Department of Finance and Accounting Service ("DFAS"), which administered Dean's pension from the navy, and to several banks where Dean had accounts, requesting copies of Dean's financial records. In keeping with IRS policy, Jackson sent Dean a copy of each of the summonses.

Dean immediately contacted each of the parties by letter to advise them that they were "under no obligation to comply with this *fraudulent* 'Summons.'" "It is *not* a court order," Dean stated in his letter of January 14, 2004. Rather, Dean asserted, "It is *a phony document* sent by a 'Revenue Agent' who has no authority to send a lawful summons to *anyone*." (emphasis in the original). See Government Ex. WJ.

On October 24, 2002, the district court upheld the penalty that IRS imposed on Dean for filing a frivolous 1997 tax return, granting summary judgment in favor of the Government. The court stated that Dean's "self-assessment of $0.00 gross and taxable income was obviously incorrect" and that "the incorrect information was due to [defendant's] frivolous justifications."

In 2002, Dean earned over $240,000. Despite that fact, Dean failed to file a tax return for 2002. Thereafter, the IRS began working with government prosecutors to indict Dean for tax evasion and attempting to interfere in the administration of internal revenue laws. On March 17, 2005, a federal grand jury siting in the Northern District of Florida, indicted Dean with six counts of income tax evasion for the years of 1997 through 2002 and one count of endeavoring to obstruct the administration of internal revenue laws. Dean's trial date was initially set for June 6, 2005, but it was subsequently postponed a number of times, until a final date was set for December 5, 2005.

On November 24, 2005, nine days before trial was to commence, Dean filed a motion to inspect the jury records pursuant to the Jury Selection and Service Act of 1968. The district court granted Dean's motion on December 1, 2005. Dean authorized his representatives to inspect the records for him, which they did the following day on December 2, 2005. Before trial started on the morning of December 5, 2005, Dean filed a motion to stay the proceedings, alleging substantial non-

compliance with the Jury Selection and Service Act in seating his grand and / or petit juries.

Dean argued that he had not been able to inspect the grand jury lists, only the petit jury lists, but that the jury qualification questionnaires for the petit jury had raised questions about whether the Clerk of the Court had followed the District Jury Plan in determining the eligibility of prospective jurors. The plan stated that eligible jurors had to be U.S. citizens, who had resided within the district for a set period of time, and had the ability to speak, read and write English. According to Dean's motion, a number of prospective jurors had indicated that they were born outside the United States, raising questions as to their citizenship. He also found that a number of prospective jurors had failed to indicate how long they had resided within the Northern District of Florida and that the qualification questionnaires did not attempt to determine whether a prospective juror could speak English. Dean suggested that these problems might have plagued the grand jury questionnaires as well.

During a hearing on the motion, Dean's counsel conceded that it could resolve Dean's doubts about the Grand Jury that very morning if the court would get a copy of the grand jury list faxed over. Dean's counsel also conceded that he would have an opportunity to resolve his doubts about the nationality, residency and English-language skills of the petit jury during *voir dire*. The court delayed trial in order to give Dean's counsel an opportunity to review the grand jury list, but it ultimately denied Dean's motion to stay the proceedings because the

motion failed to conform to procedural requirements. The court noted that the motion was untimely and that it did not include a sworn affidavit as required by statute. Although it did not need to reach the merits of the motion, the court also opined that the motion lacked merit because it did not seek to challenge the District Court Jury Plan.

Dean's trial proceeded as planned and concluded two days later on December 7, 2005. Dean filed a Motion for Judgment of Acquittal at the close of the evidence, but the court denied the motion and sent the case to the jury. The jury returned a verdict of guilty on all counts that same day. Dean renewed his Motion for Judgment of Acquittal and the court denied it once again. On July 7, 2006, the court sentenced Dean to three concurrent 60-month jail terms on Counts I - III and to three other concurrent 24-month jail terms on Counts IV - VII. The district court ordered the latter sentences to run consecutively after the sentences in Counts I - III. Dean filed a timely notice of appeal of his conviction and sentence on July 14, 2006.

II. STANDARDS OF REVIEW

Since the appellant challenges his convictions and sentence on multiple grounds, we must apply several different standards of review to his claims. First and foremost, we note that the appellant challenges several pattern jury instructions that he formerly approved at trial - the instruction regarding the crime of tax evasion and the instruction regarding the crime of attempting to interfere with the administration of internal revenue laws. We review challenges to jury instructions that are raised

for the first time on appeal under a plain error standard. *United States* v. *Puche,* 350 F.3d 1137, 1148 (11th Cir. 2003).

A "constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano,* 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States,* 321 U.S. 414, 444 (1944)). Under Rule 52(b) of the Federal Rules of Criminal Procedure, appellate courts have limited power to correct errors that were forfeited in this manner.

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the attention of the court." Fed. Rules Crim. P. 52(b). As this Court noted in *Pielago,* 135 F.3d at 711, we may find evidence of plain error in either one of two situations. One occurs where an intervening decision of this Court or the Supreme Court is squarely on point and invalidates a lower court ruling. See e.g., *United States v. Walker,* 59 F.3d 1196, 1198 (11th Cir. 1995), where an intervening decision of the Supreme Court that held the Gun Free School Zone Act unconstitutional made the defendant's conviction under that statute plain error. We will also find plain error where an erroneous decision appears to be particularly egregious, and strikes at a core principle embodied in the violated law or rule. *Pielago,* 135 F.3d at 711. See, e.g., *United States v. Quinones,* 97 F.3d 473, 475 (11 th Cir. 1996), where this Court found that the district court failed to

ensure a criminal defendant understood the nature of the charges against him, one of the core principles embodied in Fed. R. Crim. P. 11.

If we find plain error, we have the discretion to correct the error where it "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young,* 470 U.S. 1, 15(1985) (quoting *United States* v. *Atkinson,* 297 U.S. 157, 160 (1936)).

Where an appellant has objected to a jury instruction at trial, we review the court's decision to use that instruction for abuse of discretion. *See McCormick* v. *Aderholt,* 293 F.3d 1254, 1260 (11th Cir. 2002). However, we will only reverse a jury's verdict "'if we are left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Id. (quoting Roberts & Schaefer Co.* v. *Hardaway Co.,* 152 F.3d 1283, 1295 (11th Cir. 1998)).

Similarly, where a court declines to use a proffered jury instruction, we review that decision for abuse of discretion. *United States* v. *Morris,* 20 F.3d 1111, 1114 (11th Cir. 1994); *United States* v. *Carrasco,* 381 F.3d 1237, 1242 (11th Cir. 2004). As long as a defendant's theory of defense has some basis in the evidence and legal support, a defendant is entitled to have the court instruct the jury on that theory. *United States v. Orr,* 825 F.2d 1537, 1542 (11th Cir. 1987) (citing *United States v. Gold,* 743 F.2d 800, 819 (11th Cir.1984), *cert, denied,* 469 U.S. 1217 (1985)).

Nevertheless, the refusal to give a proffered instruction only constitutes reversible error if: "(1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself." *United States v. Paradies,* 98 F.3d 1266, 1286 (11th Cir. 1996) (citing *United States v. Sirang,* 70 F.3d 588, 593 (11th Cir. 1995)).

Challenges to the sufficiency of the evidence involve questions of law which we review *de novo. United States v. Dodd,* 347 F.3d 893, 900 (11th Cir. 2003). In doing so, we evaluate the evidence in the light most favorable to the government, and draw all reasonable inferences and credibility assessments in the government's favor. *United States v. Harris,* 20 F.3d 445, 452 (11th Cir. 1994).

The appellant urges us to review his challenge to the jury selection process under the same *de novo* standard. He cites *United States v. Grisham,* 63 F.3d 1074 (11th Cir. 1995) as support for the proposition that constitutional challenges to the jury selection process are reviewed *de novo.* Our responsibility is to examine the appellant's claim for what it actually is, not for what he would have it be, however. *See McKinney v. Pate,* 20 F.3d 1550, 1560 (11th Cir. 1994), *cert, denied,* 513 U.S. 1110 (1995). Although the appellant asserts that the court denied him the right to inspect grand jury lists, the record indicates that he filed a motion to inspect the jury lists on November 26, 2005, nine days before trial. The

district court granted that motion on December 1, 2005. The appellant inspected both the petit and grand Jury lists before trial was to commence.

On the day of trial, December 5, 2005, the appellant filed a motion to stay the proceedings, arguing that the court had failed to comply with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1867. The court denied that motion on procedural grounds because it was untimely, and not accompanied by a sworn statement as required by the statute. Additionally, the court found that the § 1867 challenge lacked merit because the Jury Plan had been approved by the Eleventh Circuit and the motion did not allege that the Jury Plan was defective. Indeed, the appellant's counsel conceded during oral argument before this Court that the Jury Plan was fine. Accordingly, the appellant is not actually challenging the jury selection process, but the decision to deny his motion to stay trial. We review a decision on the timeliness of a motion to stay for abuse of discretion. *See Brooks v. United States,* 416 F.2d 1044, 1047-48 (5th Cir. 1969).[1]

And, lastly, we review a constitutional challenge to a sentence *de novo. United States* v. *Chau,* 426 F.3d 1318, 1321 (11th Cir. 2005), accepting the court's factual findings unless they are clearly erroneous. *United States v. Jordi,* 418 F.3d 1212, 1214 (11th Cir. 2005).

III. DISCUSSION

A. Defendant's Motion to Stay Trial

The Appellant moved to stay the proceedings against him under 28 U.S.C. § 1867 on the day that

his trial was to begin, alleging substantial failure to comply with the provisions of 28 U.S.C. § 1867(a) in selecting the grand and /or petit jury. Section 1867 of Title 28 of the United States Code provides in pertinent part that:

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings

pending the selection of a petit jury in conformity with this title.

28 U.S.C. § 1867(a) and (d). Thus, the Jury Selection and Service Act sets two requirements for motions to stay proceedings: a timeliness requirement under § 1867(a) and a sworn statement requirement under § 1867(d).

The grand jury returned an indictment against Dean on March 17, 2005, however, Dean did not file his motion to stay the proceedings pursuant to 28 U.S.C. § 1867(a) until the first day of trial, December 5, 2005. Although, he filed his motion before *voire dire* began, the Act authorizes defendants to file a motion for a stay "before *voir dire,*" or "within seven days of when they discover or could have discovered" grounds for challenging the jury selection process, "whichever is earlier." Obviously, in this case, the earlier date would have been well before *voir dire.*

As the district court noted during oral arguments on the motion, Dean could have requested a transcript of the grand jury selection process after the Grand Jury returned its indictment against him on March 17, 2005. If he had done so, the court advised, he could have determined whether the court asked the jurors about their citizenship, length of residency within the northern district of Florida, and their English language skills. Dean cited these points as grounds for questioning the composition of the jury.

Because he did not try to inspect the grand jury list and jury qualification questionnaires within

seven days of his indictment, the date on which he could have discovered if there were grounds for a challenge, he failed to meet the deadline for filing a motion to stay under 28 U.S.C. § 1867(a). Courts are to construe the timeliness requirement strictly as failure to comply with the requirement forecloses a challenge under the Act. *Paradies,* 98 F.3d at 1277 (11th Cir. 1996) (citing *United States* v. *Bearden,* 659 F.2d 590, 595 (5th Cir. 1981), *cert, denied,* 456 U.S. 936 (1982)).

Moreover, 28 U.S.C. § 1867(d) mandates that all motions challenging compliance with the Jury Selection and Service Act of 1968 must be supported by a sworn statement of facts, which, if true, would constitute a substantial failure to comply with the Act. *United States v. Aguirre,* 108 F.3d 1284, 1287 (10th Cir. 1997). These procedural requirements are strictly enforced so that the district court has an opportunity to evaluate the alleged noncompliance and to correct it before precious judicial resources are invested in a trial. *United States* v. *Contreras,* 108 F.3d 1255, 1266 (10th Cir. 1997) (citing *United States* v. *Kennedy,* 548 F.2d 608, 612-14 (5th Cir.), *cert, denied,* 434 U.S. 865 (1977)).

Dean failed to attach a sworn statement of the facts to support his allegation that there was a substantial failure to follow the District Jury Plan for selecting eligible jurors. Accordingly, his motion to stay the proceedings fails to meet the requirements under § 1867(d) and is barred on procedural grounds. We need not reach the merits of his motion.[2]

B. The Jury Instruction Regarding the Defendant's "Good Faith " Defense

As a general rule, ignorance of the law or a mistake of law is no defense to criminal prosecution in the United States. *Cheek* v. *United States,* 498 U.S. 192, 199 (1991). However, the Supreme Court has noted that there is a "good faith" exception under the federal criminal tax statutes. *Id.* at 199-202. According to this exception, if someone simply fails to understand that he has a duty to pay income taxes under the Internal Revenue Code, he cannot be guilty of "willfully" evading those taxes. *Id.* at 201-02. The term "willfulness" presupposes the existence of a legal duty and knowledge of that duty. *Id.* at 201. If, however, someone recognizes that he has a duty to pay taxes, but simply refuses to pay or to declare his income because he believes that the Code is unconstitutional, he is not acting in "good faith." *Id.* at 204-07.

A person who is charged with tax evasion is entitled to have the jury hear an instruction on this "good faith" defense. *Id.* at 202. And, the district court provided one that was used in a Seventh Circuit case, *United States* v. *Hilgeford,* 7 F.3d 1340, 1343 n.l (7th Cir. 1993). Dean argues that the instruction misled the jury because it implied that they could reject his good faith defense if they found it to be objectively unreasonable. Dean contends that the Supreme Court rejected this sort of instruction in *Cheek.*

We find that the district court's instruction conforms quite well to the Supreme Court's holding

in *Cheek*. The district court instructed Dean's jury that:

A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in food faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

The court did not insert a caveat that a defendant's belief must be objectively reasonable to be in good faith. It simply reiterated a point that the Supreme Court made in *Cheek:*

In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. ... Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Id. at 202-04. Accordingly, we find that the district court's good faith instruction accurately stated the law on this issue. If we are satisfied that the district court's instruction has not misstated the

law or misled the jury, we give the district court "wide discretion as to the style and wording employed in the instructions." *United States* v. *Bender,* 290 F.3d 1279, 1284 (11th Cir. 2002). The district court did not abuse that discretion in this case.

Dean also argues that the district court erred in adding a willful blindness instruction at the end of its good faith instruction. There is no merit to this argument. A willfull blindness instruction is entirely appropriate where the evidence supports a finding that a defendant intentionally insulated himself from knowledge of his tax obligations. The record showed that Dean, much like the defendant in *Cheek,* had paid his taxes faithfully for a number of years before he became convinced that income taxes were unconstitutional. The record also showed that he, like the defendant in *Cheek,* had previously challenged the validity of the income tax requirement in court, and knew, as a result of the court's ruling that his arguments were frivolous. Yet, Dean failed to file a 2002 return although a court ruled against him on October 24, 2002 when he challenged a penalty that the IRS imposed on him for filing a frivolous return in 1997.

As the Supreme Court indicated in *Cheek*, albeit, not in so many words, the law would not countenance such blindness:

We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to

utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions. There is no doubt that Cheek, from year to year, was free to pay the tax that the law purported to require, file for a refund and, if denied, present his claims of invalidity, constitutional or otherwise, to the courts. See 26 U. S. C. § 7422. Also, without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court, § 6213, with the right to appeal to a higher court if unsuccessful. § 7482(a)(1). Cheek took neither course in some years, and when he did was unwilling to accept the outcome.

Cheek, 498 U.S. at 206. Thus, we conclude the district court did not err in adding a willfull blindness instruction.

C. The Jury Instruction on Income Tax Evasion and Attempted Obstruction

The district court used the Eleventh Circuit's Pattern Jury Instruction on income tax evasion, Criminal Offense Instruction 93.1, and attempting to interfere with the administration of internal revenue laws, Criminal Offense Instruction 97. Dean stated at trial that he did not object to the use of either of these instructions, so we review the court's decision to employ them under a plain error standard. *See Puche,* 350F.3d at 1148.

Granted, district courts do not have to use our pattern jury instructions for they "are not precedent and cannot solely foreclose the construction of the necessary elements of a crime as stated in the statute." *United States* v. *Ettinger,* 344 F.3d 1149,

1158(11th Cir. 2003). Nevertheless, our pattern jury instructions clearly state the elements of proof required for conviction under both 26 U.S.C. § 7201, *See Sansone* v. *United States,* 380 U.S. 343, 350-51 (1965); *United States v. Stone,* 702 F.2d 1333, 1338-39 (11th Cir. 1983), and under 26 U.S.C. 7212(a). *See United States* v. *Popkin,* 943 F.2d 1535, 1539-40 (11th Cir. 1991). Accordingly, the district court did not err, much less commit plain error, in using our pattern jury instruction on these offenses.

In a related vein, Dean also argues that the district court erred when it instructed the jury on the charges under count VII of the indictment, which deals with attempted interference in internal revenue actions. Dean contends that the district court should not have summarized the individual obstruction charges. This argument has no merit. Dean sent essentially the same letter to each of the entities that received summonses from IRS; namely, Dean's employer, the DFAS, and his banks. The individual letters stated the same falsehood - that the entities did not have to comply with the summons to produce Dean's financial records for an IRS investigation. Thus, the court could summarize the offensive conduct quite properly as "informing entities that they were under no obligation to comply with lawful summons documents from the IRS."

This Court will not reverse a conviction on the basis of a jury charge unless we find, after examining the entire charge, that "the issues of law were presented inaccurately, the charge included crimes not contained in the indictment, or the charge improperly guided the jury in such a substantial way

as to violate due process." *United States* v. *Arias,* 984 F.2d 1139, 1143 (11th Cir. 1993) (citing *United States v. Turner,* 871 F.2d 1574, 1578 (11th Cir.), *cert, denied,* 493 U.S. 997 (1989)).We find no evidence that any of these errors occurred here.

D. Denial of Defendant's Proffered Jury Instructions, Numbers 41 and 42

Dean proffered jury instructions on the requirements of 26 U.S.C. §§ 6001 and 6011. These statutes mandate that anyone who is liable for income tax must keep records, submit returns and comply with the rules prescribed by the Secretary of the Treasury. Dean argues that these statutes could be read to apply only to persons who are "liable" for tax, rather than all persons, and suggests that this reading bolsters his "good faith" belief defense. Accordingly, he argues, the district court abused its discretion when it refused to read these additional instructions to the jury.

We do not agree. The Government charged Dean with two offenses - income tax evasion and attempted interference in the administration of internal revenue laws. The district court instructed the jury on these two offenses and on "good faith," which provides a defense to the charge of income tax evasion. *See Cheek,* 498 U.S. at 202-07. Dean has not shown how the court's failure to include these additional instructions impaired his ability to mount a defense. *See United States v. Martinelli,* 454 F.3d 1300, 1318 (11th Cir. 2006). Dean was free to, and did, introduce documents into evidence at trial that quoted from sections 6601 and 6011 of the Internal Revenue Code. He had every opportunity to explain

his reading of those sections when he testified. Thus, the court did not abuse its discretion in refusing to instruct the jury on these other, not clearly relevant, sections of the Code.

E. The Sufficiency of the Evidence on the Attempted Obstruction Charge

The Government presented ample evidence that Dean attempted to interfere with the administration of the summonses issued by IRS Agent Wayne Jackson on January 10, 2004. The statute that criminalizes such interference specifically proscribes the use of corrupt or forceful methods of intimidation. 26 U.S.C.§ 7212(a). Our Pattern Jury Instruction on this offense advises that a defendant acts "corruptly" if he acts "knowingly and dishonestly with the specific intent to secure an unlawful benefit either for himself or another." Eleventh Circuit Pattern Jury Instructions, Criminal P 97 (2003).

Evidence presented at trial showed that Dean sent strongly-worded letters to his employer, the DFAS, and his banks, after he learned they had received IRS summonses to produce copies of his financial records. The letters stated in no uncertain terms that these summonses were not court orders and they had no obligation to comply with them. The letters further stated that the summonses were "phony" and "fraudulent," and that the IRS Agent had no legal authority to issue summonses. The letters closed by threatening legal action against anyone who complied with them.

Although Dean may have wanted to challenge the constitutionality of the statutes that gave IRS agents the authority to issue summons, he knew that the summonses were not phony. The IRS sent him copies of each of the summonses it issued, and he knew from his prior court challenge that IRS had clear legal authority to investigate his earnings. Nevertheless, he alleged that the summonses were phony and fraudulent in an attempt to dissuade his employer, the DFAS, and his banks from complying with the IRS and disclosing his earnings. Accordingly, we find that a rational trier of fact could have concluded that Dean was guilty beyond reasonable doubt of violating 26 U.S.C.§ 7212(a) because he acted corruptly when he made these false allegations.

F. Defendant's Challenge to His Sentencing

Dean argues that the district court erred when it based his sentence upon facts that were not conceded at trial nor proved to a jury beyond a reasonable doubt, citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). This is not the first time that he raised this objection; he asserted it at his sentencing hearing as well. Dean's Pre-Sentencing Investigation Report ("PSI") calculated his base offense level at 18 because the tax loss to the Government was $290,997.44. Dean argues that the Government did not charge the amount of tax loss in its indictment, nor prove it to the jury beyond reasonable doubt, and that he certainly did not concede this amount of loss at trial. Therefore, Dean contends it was error for the court to use this figure in calculating his Guidelines range, and that his base level should

have been calculated at 6 since the amount of loss was indeterminable.

Moreover, the court compounded this error, Dean argues, when it sentenced him in keeping with the so-called remedial portion or second majority opinion in *United States v. Booker,* 543 U.S. 220, 259-260 (2005). *Booker* held that the section of the Sentencing Reform Act which made the Guidelines mandatory was unconstitutional. *Id.* Rather than invalidate the entire Act, the Court excised that section, making the Guidelines effectively advisory.[3] *Id.* Under the mandatory sentencing scheme that prevailed at the time Dean committed his offenses, 1997-2003, Dean's maximum sentence would have been capped by the upper end of the Guidelines range.

After *Booker,* however, district courts were free to increase sentences beyond the Guidelines range.[4] This is what the district court did in Dean's case. He argues that the court violated the due process and *ex post facto* clauses of the Fifth Amendment because the offenses for which he was being sentenced occurred before *Booker.*

We have repeatedly rejected the argument that the application of the remedial portion of *Booker* to conduct that occurred prior to *Booker* violates *ex post facto* principles or due process. *United States* v. *Thomas,* 446 F.3d 1348, 1353-55 (11th Cir. 2006); *United States* v. *Duncan,* 400 F.3d 1297, 1306-08 (11th Cir.), *cert, denied,* 126 S. Ct. 432 (2005); *United States v. Hunt,* 459 F.3d 1180, 1181 n.l (11th Cir. 2006).

We have also held that a district court may make additional factual findings under a preponderance of the evidence standard, that go beyond the facts found by the jury, so long as the court recognizes the Guidelines are advisory. *United States v. Pope,* 461 F.3d 1331, 1335 (11th Cir. 2006). And, we have held that a district court may enhance a sentence based upon judicial fact-finding provided that its findings do not increase the sentence beyond the statutory maximum authorized by facts determined in a guilty plea or jury verdict. *Hunt,* 459 F.3d at 1182. We have also stated that the maximum sentence is the sentence prescribed under United States Code. *See Duncan,* 400 F.3d at 1308 (citing *United States* v. *Sanchez,* 269 F.3d 1250, 1268 (11th Cir. 2001)).

The district court applied the Guidelines as advisory. It sentenced Dean to a total of 84 months: three concurrent jail terms of 60 months on Counts I - III and three concurrent jail terms of 24 months on Counts IV - VII. The sentences for Counts I -III and Counts IV - VII were to run consecutively. Under the United States Code, the statutory maximum for tax evasion (Counts I - VI) is 60 months and the maximum for attempting to interfere with the administration of internal revenue laws (Count VII) is 36 months. See 26 U.S.C.§ 7201 and 26 U.S.C.§ 7212(a). The district court did not increase Dean's sentence beyond this statutory maximum. Additionally, we find that the amount of tax loss stated in Dean's PSI conforms to the evidence on record from the IRS. Accordingly, the district court's factual finding on the amount of loss was not clearly erroneous.

IV. CONCLUSION

The district court properly denied Dean's motion to stay proceedings because of a substantial failure to comply with the Jury Selection and Service Act. Dean's motion was untimely and it did not contain a sworn affidavit stating facts in support of his allegation. Thus, we find that his motion is barred on procedural grounds.

We also find that there was sufficient evidence to convict Dean of attempting to interfere with the administration of internal revenue laws under 26 U.S.C. § 7212(a). The record showed that Dean wrote his employer, the DFAS, and various financial institutions to notify them that the IRS had issued "phony" and "fraudulent" summonses for information from his financial records, and to advise them that he would take legal action if they released his records to the IRS. The statute criminalizes corrupt or forceful attempts to impede the administration of internal revenue laws, including the use of "threatening letters."

We also find that the district court's jury instructions were proper. The district court did not err when it used our pattern jury instructions to inform the jury on what the charges of tax evasion and attempting to interfere with the administration of internal revenue laws entailed. Nor did it err when it instructed the jury on the "good faith" belief defense that applies to charges of income tax evasion. The district court's instruction on "good faith" conformed to the standards that the Supreme Court recognized for this defense in *Cheek*.

We also find that the district court did not abuse its discretion when it refused to give the jury the additional instructions proffered by Dean. The proffered instructions concerned sections of the Internal Revenue Code that were not specifically relevant to the sections cited in the Government's charges against Dean. And, Dean did not show that the failure to give these additional instructions impacted his ability to assert a good faith defense.

Finally, we find that the district court's determination on the amount of tax loss was supported by the record and not clearly erroneous. Thus, the district court properly relied upon this finding in calculating the Guidelines range for Dean's sentence. The district court treated the Guidelines as advisory and chose to increase Dean's sentence beyond the advisory Guidelines range. This decision did not violate *Booker,* nor did it offend due process or subject him to *ex post facto* punishment.

AFFIRMED.

Notes:

[*] Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

[1] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions that the former Fifth Circuit issued prior to October 1, 1981.

[2] The district court denied Dean's motion to stay proceedings for both of the procedural reasons cited above, but it also denied Dean's motion on the

merits. See Transcript of Motions Hearing, December 5, 2005, at 14. The motion identified three potentially troublesome concerns with respect to jury qualification questionnaires: (1) some prospective jurors did not state where they were born, while others clearly stated they were born outside the country; (2) some prospective jurors did not state how long they had resided within the northern district of Florida, and lastly, (3) none of the questionnaires asked prospective jurors whether they had English language skills.

The fact that a juror indicated he or she was foreign born did not prove that the juror lacked U.S. citizenship, the court noted. Moreover, the defendant's counsel acknowledged at the motion hearing that he had not studied the District Jury Plan to know whether the court did any follow-up questioning when jurors reported for grand jury selection. Indeed, the court always asked these questions before it seated jurors reporting for grand jury duty, the court noted. Accordingly, the court concluded, the defendant had failed to meet his burden as a moving party and demonstrate that there was a "substantial failure to comply" with the Jury Selection and Service Act. Additionally, we note that Dean failed to ask any questions on these issues during *voir dire,* even though his counsel conceded during motion hearing that he could probably resolve the doubts about juror citizenship, residency or English language proficiency during *voir dire.*

[3] The Supreme Court actually excised two sections: 18 U.S.C. § 3553(b)(1), which mandated that courts impose sentences within the Guidelines

range, and a related section, 18 U.S.C. § 3742(e), which addressed the standards of review that would govern appeals. *United States v. Booker,* 543 U.S. 220 (2005).

[4] A district court must consult the Guidelines range and consider 18 U.S.C. § 3553 sentencing factors, but once it has done so, it "may impose a more sever or lenient sentence as long as it is reasonable."*United States v. Pope,* 461 F.3d 1331, 1335 (llthCir. 2006). Dean is not challenging the ultimate reasonableness of his sentence, however.

APPENDIX B

FLND Form 245B(rev 12/2003) Judgment in a Criminal Case.
3:05cr-001LAC - Ward Franklin Dean

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA
001LAC

-vs-

Ward Franklin Dean

Case #3:05cr25-

USM # 06076-017

Defendant's Attorneys:
Charles E. McFarland
(Retained)
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Newcastle, Kentucky
40050

Lowell H. Becraft
(Retained)
209 Lincoln Street
Huntsville, Alabama
35801

Office of Clerk
U.S. District Ct.
Northern Dist. Fla.
Pensacola Division

06 JUL 14 PM 2:58
FILED

John P. Weber, Esq.
(Retained)
2316 University Blvd.
Tuscaloosa, Alabama
35401

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts One through Seven of the Indictment on December 7, 2005. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such counts which involve the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNTS
26 U.S.C. §7201	Attempt to Evade or Defeat Tax (Tax Evasion)	April 15, 2003	One through six
26 U.S.C. §7212(a)	Attempt to Interfere with the Administration of Internal Revenue Laws (Obstruction of Justice)	February 26, 2002	Seven

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 says of any change pf name, residence, or mailing address until all fines,

restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence
July 6, 2006

/s/L.A. Collier
LACEY A. COLLIER
SeniorUnitedStatesDistrict

Judge

July *13*, 2006

IMPRISONMENT

The defendant is nereby committed to the custody of the United States Bureau of prisons to be imprisoned for a total term of **84 months: 60 months as to Counts One, Two and Three with terms to run concurrently one with the other; 24 months as to Counts Four, Five, Six and Seven with terms to run concurrently one with the other but consecutively to Counts One, Two and Three.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three years as to Counts One, Two and Three with terms to run concurrently one with another; Three years as to Counts Four, Five, and Six with terms to run concurrently one with another but consecutively to Counts One, Two and Three; One year as to Count Seven to run concurrently one with Counts One, Two, Three Four, Five, and Six.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependants and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall make restitution in the amount of $290,997.44 to the Internal Revenue Service, Atlanta Service Center, and at the address listed in the presentence report. Restitution will be made in monthly installments of not less than $200 per month to commence within three months after release from imprisonment.

Any unpaid fine or cost of prosecution shall be paid in monthly installments of not less than

$200 a month to commence upon the satisfaction of the restitution obligation.

The defendant shall participate in a program of mental health counseling.

The defendant will be required to provide the Probation Office with access to any financial information, report the source and the amount of personal or business income and financial assets to the supervising probation officer.

The defendant will not incur new credit charges or open additional lines of credit without the approval of the Probation Office unless he has satisfied his financial obligations.

The defendant shall not transfer, dispose of any asset, any interest in any assets, without prior approval of the probation officer unless he has satisfied his financial obligations.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____

Defendant Date

_____ _____

U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	Fine	Restitution
$700.00	**$7,500.00**	**$290,997.44**

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of **$700.00** is imposed and is to be paid immediately.

FINE

A fine in the amount of **$7,500.00** is imposed.

RESTITUTION

Restitution in the amount of **$290,997.44** is imposed.

The defendant shall make restitution to the following victims in the amounts listed below.

Name of Payee	Amount of Restitution Ordered
Internal Revenue Service Atlanta Service Center Criminal Investigations Branch	$290,997.44

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise. If nominal payments are made by the defendant the court authorizes those payments to be paid to the victims on a rotating basis.

The amount of loss and the amount of payment ordered will be the same unless, pursuant to 18 U.S.C. § 3664(f)(3)(B), the court orderd nominal payments and this is reflected in the Statement of Reasons page.

SCHEDULE OF PAYMENTS

payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim

restitution; (3) federal victim restitution; (4) fine principal' (5) costs; (6) interest; (7) penalties $303, 197.55 immediately, balance due as related below:

Breakdown of fine and other penalties is as follows:
Fine: $7,500.00 SMA: $700.00 Restitution: $290,997.44 Cost of Prosecution $4,000.11

The $700.00 monetary assessment shall be paid immediately. Any payments of the monetary assessment, fine, restitution and costs of prosecution made while the defendant is incarcerated shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. The remaining balance shall be paid as follows: In monthly installments of $200.00 (restitution) over a period of supervised release to commence three months after release from imprisonment and monthly installments of $200.00 (fine and costs of prosecution) to commence upon the satisfaction of the restitution obligation.

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice may require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the evenet the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13946-AA

D.C. Docket No. 05-00025-CR-3-LAC

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

WARD FRANKLIN DEAN, Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

Before BIRCH, FAY, and, CUDAHY, * Circuit Judges

Filed
U.S. Court of Appeals
Eleventh Circuit
JUL 27 2007
Thomas K. Kahn
Clerk

PER CURIAM:

The Petition(s) for rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, the Petition(s) for Rehearing En Banc and DENIED.

Entered for the Court

/s/ Pete Fay
United States Circuit Judge

*Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX D

Pertinent Statutes

26 U.S.C. §7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. §7212(a)

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

28 U.S.C. §1867(a)

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

28 U.S.C. §1867(f)

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

APPENDIX E

A. Pertinent Good-faith Jury Instruction.

If the government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. The purpose of the willfulness component is to avoid penalizing taxpayers who make innocent mistakes caused by the complexity of the tax code. A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

The reasonableness of a belief is a factor for the jury to consider in determining whether a defendant actually held a belief and acted upon it. The more farfetched a belief is, the less likely it is that a person actually held or would act upon that belief.

B. Pertinent Jury Instructions on Elements of Income tax Evasion.

Now, I would like to take up the specific charges set out in the indictment in this case. Please remember, as I have already told you, that the indictment is not part of the evidence in this case. It is merely an accusation, and you must not draw any inference of guilt from it.

In this case, as you know, the indictment charges seven separate offenses which we will call "counts."

In summary, Counts One through Six charge that, for the calendar years 1997 through 2002, Defendant willfully attempted to evade and defeat a substantial portion of the income tax due and owing by him to the United States of America when he well knew and believed that a substantial tax was due and owing.

Count Seven charges that Defendant corruptly endeavored to obstruct and impede the due administration of the internal revenue laws by falsely and fraudulently informing entities that they were under no obligation to comply with lawful summons for documents from the IRS.

Wage earners are subject to income tax. Section 1 of the Internal Revenue Code imposes an income tax on the income of every individual who is a citizen or resident of the United States.

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant owed substantial income tax in addition to that declared in his tax return; and

Second: That the Defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and an understanding that, during the particular tax year involved, he had income which was taxable, and which the Defendant was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which he knew he had during that year.

2

No. 07-553

01-25-08

In the Supreme Court of the United States

WARD FRANKLIN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

NATHAN J. HOCHMAN
Assistant Attorney General

ALAN HECHTKOPF
ELISSA HART-MAHAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to stay proceedings to allow him to investigate alleged errors in selecting the jury pool, when the motion was untimely and was not supported by an affidavit.

2. Whether the district court's jury instruction on good faith was erroneous.

3. Whether the district court's jury instruction on the elements of tax evasion constituted plain error.

4. Whether sufficient evidence supported petitioner's conviction for attempting to obstruct the administration of the internal revenue laws.

5. Whether the district court's application of *United States* v. *Booker*, 543 U.S. 220 (2005), at sentencing violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3.

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In the Supreme Court of the United States

No. 07-553

WARD FRANKLIN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 487 F.3d 840.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2007. A petition for rehearing was denied on July 27, 2007 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on October 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition lacks page numbers. For convenience, this brief will refer to the appendix as if its pages were numbered from 1a to 48a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on six counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of attempting to obstruct the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 30a. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. *Id.* at 31a-32a. He was also ordered to pay approximately $291,000 in restitution. *Id.* at 35a. The court of appeals affirmed. *Id.* at 1a-28a.

1. In 1996, petitioner, a medical doctor, became a tax protestor. Pet. App. 2a. Although he earned at least $136,000 that year, petitioner filed a "zero" return—that is, a return that stated that he had no income and owed no taxes. *Id.* at 2a-3a. Petitioner "also submitted a revised W-4 form to his employer, claiming that he was exempt from federal income tax withholding." *Id.* at 3a. Petitioner disregarded the returns prepared by his accountant for the 1996 and 1997 tax years, which reflected his actual income and tax liabilities. *Ibid.* He also ignored correspondence from the Internal Revenue Service (IRS) informing him that his "zero" returns were inaccurate and frivolous and that he was required to pay income tax. *Ibid.* Petitioner went on to file "zero" returns for the 1997 through 2001 tax years, in spite of the fact that he continued to earn substantial income. *Id.* at 3a-4a.

In its investigation of petitioner's actual tax debt, the IRS sought to obtain copies of petitioner's financial records by issuing summonses to petitioner's employer and to banks where he had accounts. Pet. App. 4a. Petitioner responded by sending letters to each of those par-

ties advising them that they were "under no obligation to comply with this *fraudulent* 'Summons,'" which, he said, was "a *phony document* sent by a 'Revenue Agent' who has no authority to send a lawful summons to *anyone*." *Ibid.* Meanwhile, in 2002, the district court upheld a $500 penalty that the IRS had imposed on petitioner for filing a frivolous return for the 1997 tax year. *Id.* at 4a-5a. Petitioner earned more than $240,000 in 2002, but he failed to file a tax return. *Id.* at 5a.

2. A grand jury sitting in the Northern District of Florida returned an indictment charging defendant with six counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of attempting to obstruct the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 5a. After several delays caused by petitioner, Gov't C.A. Br. 15-23, the district court set a trial date of December 5, 2005. Pet. App. 5a.

On November 24, 2005, petitioner moved to inspect the jury records. Pet. App. 5a. The district court granted the motion on December 1, and petitioner's representative inspected the records the next day. *Ibid.* On December 5—the day the trial was scheduled to begin—petitioner moved to stay the proceedings for failure to comply with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, in selecting the grand and petit jurors. Pet. App. 5a-6a. Specifically, petitioner alleged that the information he received about potential petit jurors suggested that some of them might not be qualified to serve as jurors under the district's jury plan. *Id.* at 6a. Petitioner also alleged that he had been denied access to the records dealing with grand jury selection. *Ibid.*

The district court held a hearing on petitioner's motion. At the hearing, petitioner conceded that any ques-

tions about the qualifications of the petit jurors could be resolved during voir dire. Pet. App. 6a. The district court agreed to delay the trial to allow petitioner an opportunity to review the grand jury list, but it denied the motion to stay the proceedings, explaining that the motion was untimely and did not include an affidavit, as required by statute. *Id.* at 6a-7a. The court also stated that it believed the motion lacked merit. *Id.* at 7a.

3. At trial, petitioner testified that he had a good-faith belief that he did not have to pay income tax. Gov't C.A. Br. 8. The district court instructed the jury:

> A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in [good] faith. Nevertheless, you may consider whether the defendant's belief was actually reasonable as a factor in deciding whether he held that belief in good faith.

Pet. App. 16a.

The jury returned a verdict of guilty on all counts. Pet. App. 7a. At sentencing, the district court applied *United States* v. *Booker*, 543 U.S. 220 (2005), and treated the Sentencing Guidelines as advisory, imposing a sentence above the Guidelines range. Pet. App. 23a; Gov't C.A. Br. 13-15. Petitioner was sentenced to 84 months of imprisonment, to be followed by three years of supervised release; he was also ordered to pay approximately $291,000 in restitution. Pet. App. 31a-35a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court rejected petitioner's argument that the district court should have stayed proceedings to allow further investigation of the selection of the jury pool. The

court of appeals agreed with the district court that the motion was procedurally deficient in two respects: it was untimely, and it was not supported by an affidavit as required by the statute. *Id.* at 11a-14a.

The court of appeals also rejected petitioner's challenge to the jury instructions and to the sufficiency of the evidence. It held that the district court's instruction on good faith correctly explained that a good-faith belief negates the willfulness element required for a conviction under 26 U.S.C. 7201. Pet. App. 15a-18a. Reviewing for plain error, it also concluded that the jury instructions had correctly stated the elements of an offense under Section 7201. *Id.* at 18a-20a. And it determined that petitioner's letters to his employer and to his banks, instructing them that summonses from the IRS were "phony" and "fraudulent," provided a sufficient basis for the jury to conclude that he had attempted to impede the administration of the internal revenue laws. *Id.* at 21a-22a.

Finally, the court of appeals held that the application of *Booker* at sentencing was consistent with the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, and with due process. Pet. App. 22a-24a.

ARGUMENT

Petitioner contends (Pet. 6-40) that the district court should have granted a stay of proceedings based on alleged deficiencies in selecting the jury pool, that the district court's jury instructions were erroneous, that the evidence was insufficient to convict him of attempting to impede the administration of the internal revenue laws, and that the district court's application of *United States* v. *Booker*, 543 U.S. 220 (2005), violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. The

court of appeals carefully considered these arguments and rejected all of them. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner asserts (Pet. 6-16) that the district court's denial of his motion to stay the proceedings violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and that the opinion of the court of appeals conflicts with this Court's opinion in *Test* v. *United States*, 420 U.S. 28 (1975) (per curiam). Contrary to petitioner's argument, the district court's decision was consistent both with the statute and with *Test*.

The Jury Selection and Service Act governs the selection of grand and petit juries in federal court. The Act requires each federal district court to devise a written plan for the random selection of jurors. 28 U.S.C. 1863(a). See Gov't C.A. Br. App. E (jury plan for the Northern District of Florida). The Act also provides that "[t]he parties in a case shall be allowed to inspect, reproduce, and copy" records relating to the jury selection process "at all reasonable times." 28 U.S.C. 1867(f). A defendant who wishes to challenge the jury-selection process must present that challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. 1867(a). Any motion to stay the proceedings must contain a "sworn statement of facts which, if true, would constitute a substantial failure to comply with [the Act]." 28 U.S.C. 1867(d). The procedures prescribed in Section 1867 "shall be the exclusive means by which a person * * * may challenge any jury on the ground that such jury was not se-

lected in conformity with the provisions of [the Act]." 28 U.S.C. 1867(e).

As the court of appeals explained, petitioner's motion to stay the proceedings was procedurally deficient for two independent reasons. Pet. App. 13a-14a. First, the motion was untimely. Petitioner was indicted on March 17, 2005, but he did not move to stay the proceedings until December 5. Petitioner could have investigated the alleged problems with the jury selection procedures at any time after the indictment, but he did not raise the issue until immediately before the trial was scheduled to begin—more than eight months later, and far more than "seven days after [petitioner] discovered or could have discovered, by the exercise of diligence, the grounds" for his challenge. 28 U.S.C. 1867(a). Petitioner has made no effort to explain the delay. Second, petitioner's motion to stay the proceedings did not contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act]." 28 U.S.C. 1867(d). Thus, the court of appeals correctly concluded that petitioner's motion to stay the proceedings was procedurally barred.

Contrary to petitioner's suggestion (Pet. 10-14), the decision of the court of appeals is also consistent with *Test*. In *Test*, this Court held that a litigant has a right to inspect jury selection materials under Section 1867, 420 U.S. at 30, but it emphasized that "the statute does limit inspection to 'reasonable times,'" *id.* at 30 n.4. *Test* does not create an unqualified right to inspect jury selection records at any time, nor does it compel a district court to grant a motion to stay the proceedings that does not conform to the requirements of Section 1867. Petitioner's argument rests on the erroneous premise that the district court did not permit him to inspect the

jury selection records. In fact, the district court *granted* his motion to inspect the records. What the district court denied was petitioner's motion to stay the proceedings, and that denial was compelled by the plain language of Section 1867.

2. Petitioner next contends (Pet. 16-23) that the district court's instruction on good faith was erroneous. Petitioner is incorrect.

In order to convict a defendant of a federal tax crime, the government must prove that the defendant acted willfully, that is, that he voluntarily and intentionally violated a known legal duty. See *Cheek* v. *United States*, 498 U.S. 192, 201 (1991). In *Cheek*, this Court held that a defendant's "good-faith belief that he was not violating any of the provisions of the tax laws" negated willfulness. *Id.* at 202. Consistent with *Cheek*, the district court in this case instructed the jury that "[a] defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in [good] faith." Pet. App. 16a.

Petitioner objects (Pet. 21-23) that the court went on to explain that the jury could "consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith," Pet. App. 16a, but that statement was also correct. As the Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge." 498 U.S. at 203-204. Several courts of appeals

have approved similar instructions, concluding that *Cheek* permits the jury to consider the reasonableness of a defendant's claimed belief in evaluating whether the defendant actually believed it in good faith. See *United States* v. *Pensyl*, 387 F.3d 456, 459-460 & n.1 (6th Cir. 2004); *United States* v. *Hilgeford*, 7 F.3d 1340, 1343-1344 & n.1 (7th Cir. 1993); *United States* v. *Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993). Petitioner does not allege that the decision of the court of appeals to approve the instruction in his case is inconsistent with any decision of any other court of appeals.

Petitioner asserts (Pet. 19-20) that the district court should have instructed the jury that the government had the burden of negating his good-faith defense. In light of the district court's instruction that the government had to prove that defendant knew of his legal obligations and that petitioner did not willfully violate the law if he had a good-faith belief in the legality of his actions, such an instruction would have been superfluous. A jury is presumed to follow its instructions, see *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and here, the jury could not have found petitioner guilty without finding that the government had proved petitioner's knowledge of the law beyond a reasonable doubt, nor could it have convicted petitioner if it had found that petitioner was acting in good faith. Accordingly, the district court's good-faith instruction was sufficient.

3. Petitioner argues (Pet. 23-29) that the district court erred in instructing the jury on the elements of tax evasion. Because petitioner failed to preserve that claim, it was subject to review for plain error only, Pet. App. 18a; see Fed. R. Crim. P. 52(b), and therefore petitioner could prevail only if the error were "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). The

court of appeals correctly determined that there was no error.

Tax evasion under 26 U.S.C. 7201 involves "willfully attempting in any manner to evade or defeat any tax imposed by the Internal Revenue Code." *Sansone* v. *United States*, 380 U.S. 343, 350 (1965). The elements of tax evasion are "willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax." *Id.* at 351 (citations omitted). The filing of a false tax return constitutes an affirmative act under 26 U.S.C. 7201. *Sansone*, 380 U.S. at 351-352.

Here, the district court instructed the jury that it could find petitioner guilty of tax evasion only if the government proved beyond a reasonable doubt, "[f]irst: That [petitioner] owed substantial income tax in addition to that declared in his tax return; and [s]econd: That [petitioner] knowingly and willfully attempted to evade or defeat such tax." Pet. App. 46a-47a. The district court further instructed the jury that petitioner could attempt to evade the tax "by willfully failing to report all of the income which he knew he had during that year." *Id.* at 47a. That instruction required the jury to find that petitioner filed a false tax return in order to find him guilty of tax evasion. Although the instruction did not include the phrase "affirmative act," the instruction, when read as a whole, included the three elements identified by this Court in *Sansone*.

Contrary to petitioner's theory, there is no risk that the jury found petitioner guilty based on a finding that he failed to act. In this case, it was undisputed that petitioner filed several returns that reported both his income and his tax liability as "zero." Under the district court's instruction, the jury could find guilt only if it

found that those "zero" returns substantially understated petitioner's tax liability or income and that the understatement was a willful attempt to evade tax. The instruction was entirely consistent with *Sansone* and with the pattern instructions cited by petitioner (Pet. 26-29).

4. Petitioner asserts (Pet. 29-37) that there was insufficient evidence presented at trial to support his conviction under 26 U.S.C. 7212(a) for corruptly impeding or obstructing the due administration of the internal revenue laws. That claim lacks merit.

The courts of appeals have interpreted Section 7212(a) broadly to encompass actions such as filing false tax forms with the IRS, see *United States* v. *Bowman*, 173 F.3d 595, 600 (6th Cir. 1999); filing a false return and false forms, see *United States* v. *Winchell*, 129 F.3d 1093, 1099 (10th Cir. 1997); aiding in the concealment of assets, see *United States* v. *Wilson*, 118 F.3d 228, 234-235 (4th Cir. 1997); and creating a sham corporation to disguise income, see *United States* v. *Popkin*, 943 F.2d 1535, 1541 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992). See also *United States* v. *Hanson*, 2 F.3d 942, 947 (9th Cir. 2003) (filing of false IRS forms reporting payments that had never been made and claiming a tax refund that was not due); *United States* v. *Mitchell*, 985 F.2d 1275, 1277, 1279 (4th Cir. 1993) (fraudulent claim and use of tax-exempt status, and inducing others to file false returns); *United States* v. *Kuball*, 976 F.2d 529, 529-531 (9th Cir. 1992) (filing forms that falsely report payments and income and improperly seek a refund); *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.) (aiding and abetting the filing of false W-4 forms), cert. denied, 454 U.S. 841 (1981).

In this case, in addition to filing numerous false returns, petitioner sent letters to his banks and employers designed to prevent them from cooperating with the IRS investigation of his income. That conduct easily falls within the scope of Section 7212(a). Contrary to petitioner's assertions (Pet. 33), the letters went beyond advising financial institutions to comply with the law. The letters stated that the summonses sent by the revenue agent who was investigating petitioner were "phony" and "fraudulent," despite the fact that petitioner had received copies of all of the summonses and knew that they came from the IRS. Pet. App. 21a. "The letters closed by threatening legal action against anyone who complied with [the IRS summonses]." *Ibid.* In light of the substantial evidence of petitioner's efforts to disrupt the IRS's investigation, the jury could reasonably conclude that petitioner corruptly endeavored to interfere with the administration of the internal revenue laws.[2]

5. Finally, petitioner contends (Pet. 37-40) that his sentence violates the Ex Post Facto Clause because the district court applied *Booker* in sentencing him to a term that exceeded the range specified by the Sentencing Guidelines. That theory has been rejected by every court of appeals to consider it.

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[2] Petitioner argues (Pet. 34-37) that his conviction violates the First Amendment. Petitioner did not raise that claim before the district court, see Gov't C.A. Br. 30-31, and the court of appeals did not address it. In any event, the argument lacks merit because there was ample evidence that petitioner's letters were false and fraudulent, and the First Amendment does not protect speech that constitutes fraud or public deception. See, *e.g.*, *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

The Ex Post Facto Clause prohibits the retroactive application of laws that increase the punishment for a given crime. See *Rogers* v. *Tennessee*, 532 U.S. 451, 456 (2001). The text of the clause is directed to legislatures, not courts. While the Ex Post Facto Clause does not apply to judicial action, this Court has held that "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process," *ibid.*, which requires that a defendant have "fair warning" of the criminal penalty resulting from his conduct, *id.* at 459-461.

This Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), altered the federal sentencing regime by making the Sentencing Guidelines advisory rather than mandatory. In the wake of *Booker*, a district court must calculate the appropriate advisory Guidelines range and consider all of the factors set out in 18 U.S.C. 3553(a) (2000 & Supp. V 2005) before sentencing, but the sentence need not be within the advisory Guidelines range. See 543 U.S. at 260-261; *United States* v. *Rita*, 127 S. Ct. 2456, 2464 (2007). In this case, the government argued at sentencing that the district court should impose an above-Guidelines sentence because of petitioner's extensive obstructive conduct and because of his role in encouraging others not to pay taxes. Gov't Sentencing Mem. 1-7. The government argued that either an upward departure under the Guidelines or an upward variance based on the Section 3553(a) factors would be appropriate. The court ultimately imposed an above-Guidelines sentence.

Petitioner claims that, because his sentence exceeded the advisory Guidelines range, the retroactive application of this Court's holding in *Booker* violated the Ex Post Facto Clause. This Court's decision in *Booker*, however, did not enact a statute; accordingly, the Ex

Post Facto Clause has no direct application. Nor does the retroactive application of *Booker* in sentencing for pre-*Booker* crimes transgress due process notice concerns. Even under the pre-*Booker* sentencing regime, the district court could have departed upward and imposed exactly the same sentence. See *United States* v. *Lata*, 415 F.3d 107, 112 (1st Cir. 2005). Because petitioner had fair notice that he could be subject to a sentence above the Guidelines range, this Court's decision in *Booker* did not bring about an "unexpected and indefensible" change in the law, and therefore it did not violate the ex post facto principles protected by the Due Process Clause. *Rogers*, 532 U.S. at 457.

Every court of appeals to consider the question has determined that the retroactive application of *Booker* does not violate the Ex Post Facto Clause. See *United States* v. *Barton*, 455 F.3d 649, 656-657 (6th Cir.), cert. denied, 127 S. Ct. 748 (2006); *United States* v. *Pennavaria*, 445 F.3d 720, 723-724 (3d Cir.), cert. denied, 127 S. Ct. 531 (2006); *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Alston-Graves*, 435 F.3d 331, 343 (D.C. Cir. 2006); *United States* v. *Austin*, 432 F.3d 598, 599-600 (5th Cir. 2005); *United States* v. *Vaughn*, 430 F.3d 518, 524-525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Dupas*, 419 F.3d 916, 921 (9th Cir.), cert. denied, 547 U.S. 1011 (2006); *United States* v. *Jamison*, 416 F.3d 538, 539 (7th Cir. 2005); *United States* v. *Lata*, 415 F.3d 107, 110-112 (1st Cir. 2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304 (11th Cir.), cert. denied, 546 U.S. 940 (2005). Particularly in light of the fact that the retroactive application of *Booker* is a matter of steadily diminishing importance and has no prospective significance for crimes committed after the January

2005 decision in *Booker*, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2008